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ABSTRACT

This monograph attempts to provide clear understanding of the standards presented by the Supreme Court in "New Jersey v. T.L.O." relative to search and seizure in public schools, and suggests practical ways of applying search and seizure law to situations in the school setting. ("T.L.O." are the initials of the anonymous student.) After an introduction, section 2 examines students' rights and the Fourth Amendment, describing the amendment's source and applicability in public schools. The reasonableness standard is examined in the third section, applying the standard to "New Jersey v. T.L.O." and detailing a two-pronged test, the TIPS formula. Taking into account certain variables, the TIPS formula aids in search and seizure decisions by defining reasonable search as comprising two elements: (1) reasonable suspicion, examining the thing to be found and the information source; and (2) reasonable scope, involving the place or person being searched and the measures used in the actual search. (TIPS stands for the thing to be found, the information source, the place or person being searched, and the search methods.) Considerations of penalties, involvement of the police, and common errors are examined in section 4. Section 5 focuses on application of the reasonableness standard after the "New Jersey v T.L.O." case and discusses other cases involving search and seizure and/or drug testing. Sections 6 and 7 contain a summary, and conclusion and remarks, respectively. Included in the monograph are five figures. (WTH)

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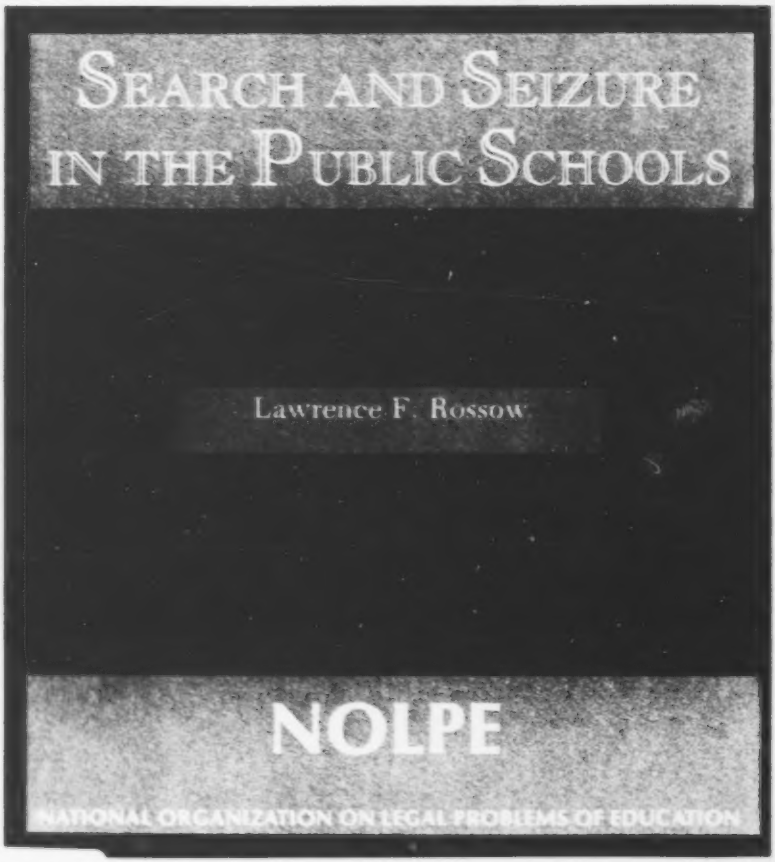

Search and Seizure in the Public Schools

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About the Author

Dr. Lawrence F. Rossow is Associate Professor of Educational Administration and Adjunct Associate Professor of Law at Washburn University. He is responsible for teaching school law to graduate students in educational administration as well as professional law students. Dr. Rossow received his doctorate in Educational Administration, specializing in school law, from Loyola University of Chicago where he studied at the School of Education and the School of Law. Prior to joining the faculty at Washburn University, Dr. Rossow spent thirteen years as a school administrator and teacher. He has been a principal and superintendent and has taught at both the elementary and high school levels in rural, urban, surburban and inner-city settings.

Dr. Rossow has made numerous presentations regarding school law issues and often consults with school administrators regarding legal related educational problems. He has written extensively in the field of school law with articles appearing in such publications as the *Journal of Law and Education* and *West's Education Law Reporter*.

The results of his legal research have been recognized by a number of professional organizations as well as cited in their journals. He is a member of the NOLPE Board of Editors and serves on the Authors Committee of *West's Education Law Reporter*.

I. Introduction

Search and seizure in the public schools has long been a problem for both school authorities and law enforcement officers. In addition, students have been known to have been deprived of their constitutional rights as a result of a school search. Much of the problem stems from lack of clarity in the application of the fourth amendment to the school setting. The myriad of lower court holdings makes certainty of the law difficult. Judicial interpretations are often locally contradictory. This state of affairs has confused both school authorities and law enforcement officials. Practices and procedures that were proper yesterday may be wrong today.

Many had hoped that when *New Jersey v. T.L.O.*, reached the Supreme Court, confusion would come to rest. While *T.L.O.* did provide a new standard for use in public school search and seizure, the case left many questions unanswered. By his own admission, Justice White, author of the *T.L.O.* majority opinion, provided a list of issues not addressed: (1) Does the *exclusionary rule* apply to the fruits of an unlawful search in the public school?[1] In other words, will a court throw out the case because the school official did not follow proper procedure in obtaining evidence. (2) Do students have privacy rights in connection with their *lockers, desks or other storage areas* the school provides? If so, what are the standards for searching these areas?[2] (3) Do the standards change if the police are involved?[3] Does it matter that the police made the request to search as opposed to the school requesting the assistance of the police? (4) Is it necessary to have *individualized suspicion* before a search takes place?[4] In other words, must school authorities know exactly which students are suspected of carrying contraband? If this is a requirement, will it have implications for searching groups of students?

In addition to the unanswered questions recognized by the Court, there are a number of other issues left unresolved by *T.L.O.*: (1) What is the status of *sniff dogs* and their use in school searches? (2) What about searching students' *vehicles?* Are there different procedures depending on whether the car is occupied? (3) To what extent are school officials *liable* for searches that are found to be illegal?

The primary purpose of this monograph is twofold: first, to provide a clear understanding of the standards presented by the Supreme Court in *T.L.O.* as well as answers to the great number of issues left unresolved; and second, to suggest some practical ways of applying search and

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1. New Jersey v. T.L.O., 105 S. Ct. 733 (1985), at 739 n.2.
2. *Id.* at 741 n.5.
3. *Id.* at 744 n.7.
4. *Id.* at n.8.

seizure law to situations in the school setting. A model for the application of search and seizure law called TIPS will be introduced. This model consists of the variables which the practitioner should consider before engaging in a search.

II. Students' Rights and the Fourth Amendment

A. Source of Search and Seizure Law

The fourth amendment to the Constitution of the United States is the source of search and seizure law. The amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[5]

Originally the fourth amendment was thought only to protect citizens from the federal government. However, in 1961 the Supreme Court held that the protection of the amendment extends to state action through the fourteenth amendment.[6] The amendment exists to protect citizens against "unreasonable searches" by the government. Therefore a search itself may be legal as long as it is reasonable. Determining what is "reasonable" has been the main problem for the courts in the search and seizure arena.

While a citizen is protected against unreasonable searches, government has a need to enforce the law. The need for government to obtain information may outweigh individuals' needs to keep their privacy. The right of privacy is not absolute; it is relative. The degree of protection may depend on the purpose of the search, the person doing the searching, the place being searched, the background or type of person being searched, the severity of the penalties resulting from the search, and the extent to which the persons' privacy was invaded by the searcher?[7]

Courts have balanced these variables in the process of determining whether "probable cause" exists. Finding probable cause, magistrates will issue a warrant. This process represents the preferred approach to

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5. U.S. Const. amend. IV.

6. Mapp v. Ohio, 367 U.S. 643 (1961)

7. For excellent background concerning the fourth amendment see L. Goering, *Constitutional Law: Privacy Penumbra Encompasses Students in School Searches [New Jersey v. T.L.O., 105 S. Ct. 733 (1985)]*, 25 Washburn L.J. 135 (1985).

searching, since the Supreme Court has ruled that warrantless searches are per se violative of the fourth amendment.[8] However, there are exceptions to the warrant requirement. An exception will be made if the following conditions exist: (1) There is consent by the person to be searched; (2) an emergency situation exists where taking time to get a search warrant would eliminate the chances of obtaining evidence; (3) a valid arrest has been made and the search is part of the arrest; and (4) the search or seizure is necessary for the safety of the searcher. These exceptions to the warrant requirement still require probable cause.

The foregoing represents the basis of search and seizure law generally. This law cannot be directly applied in the school setting. A wide range of different approaches are used when dealing with children in school.

B. Privacy Rights of Students and New Jersey v. T.L.O.

Until recently, the courts were split on the question of whether the fourth amendment applied at all to students. Those who thought it did not apply advanced two theories. One theory was that school authorities are "private persons." Since the fourth amendment protects only against action by government, the restrictions do not extend to school officials. The second theory involved the notion of *in loco parentis*. Literally translated from the Latin, "in place of parents," the doctrine states:

> The parent may also delegate part of his parental authority, during his life, to the tutor or the schoolmaster of his child; who is then in loco parentis, and has such a portion of power of the parent committed to his charge, *viz* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[9]

The fourth amendment and its probable cause requirement could be set aside if school authorities were thought to be acting "in the place of parents" and not as government officials.

The position that students have no privacy rights was rejected by *New Jersey v. T.L.O.*

1. The Case of T.L.O.

The case of *T.L.O.* (the letters T.L.O. were used by the court to keep the student anonymous) involved a 14 year old female Piscataway (New

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8. M. Schiff, *The Emergence of Student Rights to Privacy under the Fourth Amendment*, 34 Baylor L. Rev. 209 (1985).
9. 12 Blackstone, Commentaries* 453.

Jersey) High School student. On March 7, 1980, she was caught smoking in the lavatory by a teacher. T.L.O. was with a companion student who was also apprehended. Since school rules prohibited smoking in the restroom, the teacher took both girls to the office. The girls were questioned by the assistant principal. T.L.O.'s companion admitted to the infraction but T.L.O. denied she had been smoking.

The assistant principal demanded to see T.L.O.'s purse and found a package of cigarettes in plain view. Other suspicious material was uncovered by removing the cigarettes. He noticed cigarette rolling papers which he assumed meant marijuana was involved. Searching further, he found marijuana, forty one-dollar bills, and a pipe typically used for smoking hash. In a separate zippered compartment of the purse he found an index card with a written heading, "People who owe me money." The card contained a list of names with dollar amounts next to each name. Also in the separate compartment were two letters that discussed marijuana business. The assistant principal telephoned T.L.O.'s mother who drove her to the police station.[10]

T.L.O. admitted that she sold marijuana to other students. She was then suspended three days for smoking cigarettes in a non-smoking area and seven days for possession of marijuana. Also, she was charged by the police with delinquency based on the physical evidence submitted by the assistant principal, and her confession. At the delinquency hearing, T.L.O. contended that the search of the purse violated her fourth amendment privacy rights and, therefore, the evidence and her confession should be excluded. However, the juvenile court found T.L.O. delinquent. On appeal, the New Jersey Supreme Court reversed, holding that the evidence had been obtained in violation of T.L.O.'s constitutional rights. New Jersey appealed the decision to the Supreme Court. New Jersey asked the Court to decide the single issue of whether the exclusionary rule applies to evidence obtained by school officials in violation of the fourth amendment. In other words, should a juvenile court throw out evidence seized by school authorities because it finds there was no probable cause—a standard which the police must follow. After hearing arguments, the Court decided not to rule on the issue. Instead it ordered reargument on whether the fourth amendment applies to the school setting. If it does, to what degree and by what standards does it apply?

2. Do Students Have a Right to Privacy?

The Supreme Court in *T.L.O.* took its position on student privacy rights as they fashioned answers to the questions posed. New Jersey had

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10. 105 S. Ct. at 736-37.

argued that the fourth amendment did not apply because of the *in loco parentis* doctrine. Writing for the majority, Justice White rejected the argument and maintained that school authorities are state officials, not stand-ins for parents:

> If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students . . . . In carrying out searches and other disciplinary functions . . . school officials act as representatives of the [s]tate, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the [f]ourth [a]mendment.[11]

Therefore, the fourth amendment does indeed apply to the school setting. Its application extends to school authorities as a limitation on their search activities and to students as a protection from unreasonable searches. Since the fourth amendment applies, the Court went on to point to some of the privacy rights of students under the Constitution.

New Jersey had maintained that students have no privacy rights at all because of the special relationship between students and school authorities. It was argued that because of the high level of supervision schools must maintain over students, there is "virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school."[12] The New Jersey argument was founded on two premises: (1) A student having an expectation of privacy is incompatible with the school's trying to maintain a sound educational environment. (2) A student has little need to bring items of personal property into the school.

Once again the Court rejected the New Jersey argument stating, "Both premises are severely flawed."[13] Although Justice White sympathized with the job the schools do in maintaining order, that duty is not so great as to cancel out students' privacy rights. As to students having no need to bring personal property to school, White criticized New Jersey for not being realistic. He wrote:

> Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene

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11. *Id.* at 741.
12. *Id.* at 742.
13. *Id.*

> and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, school children may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.[14]

Therefore, students do have privacy rights for certain items they bring to school. However, the expectation of privacy is not limitless. White stated that the fourth amendment does not provide privacy for contraband: "Of course the fourth amendment does not protect subjective expectations of privacy that are unreasonable or otherwise 'illegitimate'. To receive the protection of the fourth amendment, an expectation of privacy must be one that society is 'prepared to recognize as legitimate.'"[15]

White returned to the discipline issue, perhaps to make sure that sufficient deference was paid to school authorities' difficult task in maintaining order. The proper perspective is to recognize that a student has *some* privacy rights but not to the extent where schools are hampered in maintaining an orderly environment:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate effective action." *Goss v. Lopez*, 419 U.S. 565, at 580, 95 S. Ct. 729, at 739. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of

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14. *Id.*
15. *Id.*

> flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.[16]

For the remainder of the case, the task of the Court was to determine how to strike a balance between the interests of the school in maintaining order and the student in retaining some privacy rights.

III. The Reasonableness Standard

In attempting to strike a balance between the competing interests of school and student, the Supreme Court in *T.L.O.* proposed the *reasonableness standard*. It said that the higher probable cause standard which police must follow is unsuited to the school environment. School officials do not need to obtain a warrant before searching a student. The Court felt that requiring a search warrant and/or probable cause would "interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[17] The better rule, the Court held, is that "the legality of a search of a student shall depend simply on the *reasonableness, under all the circumstances of the search.*" (emphasis added) In using the reasonableness standard, a two-part analytical device was offered: First, was the search justified at its inception—in other words, did the searcher have *reasonable suspicion*? Second, was the search *reasonable in scope*—in other words, was the search more intrusive than it had to be? Further, was the type of search related to the object to be found? Elaboration on the use of these two analytical prongs is needed. A good beginning might be to see how the Supreme Court applied the reasonableness standard to the facts in *T.L.O.*

A. Applying the Reasonableness Standard in T.L.O.

In applying the two-pronged reasonableness standard, the Court had no difficulty in upholding the search of T.L.O. The Court viewed the assistant principal as actually having conducted two searches: one for the cigarettes and one for the marijuana and related evidence. In the first search, the assistant principal had *reasonable suspicion* to enter T.L.O.'s purse. She had been caught "red handed" by a certified teacher. T.L.O.

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16. *Id.* at 742-43.
17. *Id.* at 743.
18. *Id.* at 743-44.

argued that mere possession of cigarettes was not an infraction and therefore the assistant principal had no reason to go into T.L.O.'s purse since he could not have known that cigarettes were there. The Court responded by giving a lesson on the rules of evidence:

> But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only to have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[19]

Therefore, the assistant principal might have been able to corroborate the teacher's report of unauthorized smoking by entering the purse. The kind of "hair-splitting" approach that New Jersey argued should have been used has no place in the school setting. Rather, the Court supported the position that school officials should simply use their good judgment in approaching the reasonable suspicion standard. White wrote: "It was the sort of 'common sense' conclusion(s) about human behavior upon which 'practical people'—including government officials—are entitled to rely."[20] The question of reasonable scope did not enter consideration until the second search.

The second search was also found to be reasonable (at its inception and in its scope). In picking up the pack of cigarettes, rolling papers were exposed. In the administrator's experience, the presence of rolling papers meant marijuana could be involved. After discovering the marijuana and a quantity of cash, he was encouraged that further searching would be necessary to provide supporting evidence that T.L.O. was a drug trafficker. When he entered the zippered compartment of the purse, the Court concluded this was a reasonable extension of his previous discoveries. When the assistant principal found a list of names and two letters, the evidence was substantial enough to justify examination of the private correspondence. Therefore, the assistant principal had reasonable suspicion for the second search.

Although T.L.O. argued that the seizing and reading of her private letters exceeded *reasonable scope*, the Court rejected her position by pointing to the overall reasonableness with which the assistant principal conducted the searches. The Court did not feel that reading the letters was too intrusive given all of the preceding evidence.

In sum, the search of T.L.O. met the reasonableness standard. First, reasonable suspicion was met because there was reasonable grounds for suspecting that searching T.L.O.'s purse would turn up evidence to corroborate a teacher's report of wrong-doing. Second, the search was

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19. *Id.* at 745-46.
20. *Id.* at 746.

reasonable in scope since the measures adopted (going through the purse) were directly related to turning up evidence in support of T.L.O.'s suspected infraction.

B. Elaborating on the Two-Pronged Test— the TIPS Formula

While the *T.L.O.* case gave credence to the reasonableness standard, the facts of the case do not encompass all the search and seizure circumstances that occur in public schools. Once more, considerable case law provided by the lower courts was left in place by the Court. T.L.O.'s major contribution was to provide an analytical framework for deciding search and seizure issues in the public school. In using the Court's framework, it is necessary to keep a number of variables in mind when assessing whether a search is reasonable. In order to recall those variables, the reader can be aided by the following formula:

Figure 1

TIPS Formula

Reasonable Search = TIPS

that is

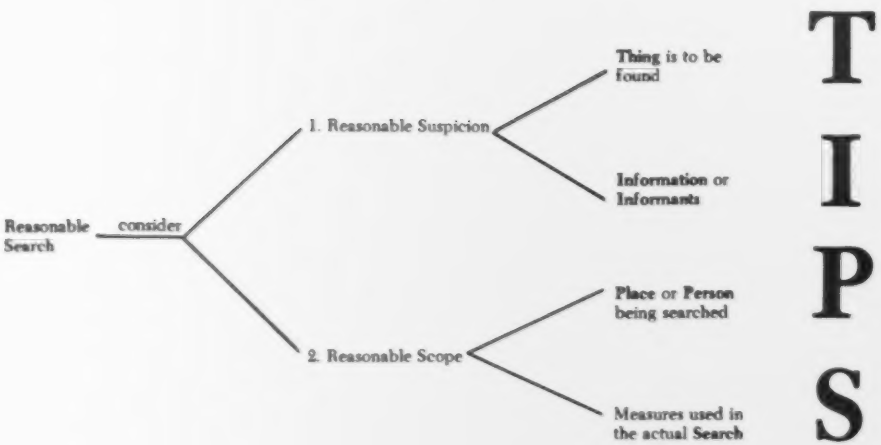
REASONABLE SEARCH = [The **Thing** after which the searcher is seeking] X [The sufficiency of the **Information** or **Informant** which lead the searcher to believe a search was necessary] X [The **Place** or **Person** of the search i.e., locker, car or person] X [The measures used in the actual **Search**]

T I P S

The first two letters of the acronym "T" and "I" are those variables that must be considered under the first prong of the reasonableness standard that is—reasonable suspicion. The second two letters, "P" and "S" are those considered under the second prong—reasonable scope. An additional schema might be helpful:

Figure 2

Reasonableness Standard Schema



C. Reasonable Suspicion (TIPS)

In the *T.L.O.* case, the suspicion test is focused on whether the search is "justified at its inception." So, to determine whether the school official is justified in searching, the Court ruled that there be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[21]

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21. *Id.* at 744.

Justice White said that "the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness . . . .'"[22] How then can an administrator tell when the suspicion test is met beyond knowing that there need not be absolute certainty that the search will turn up some incriminating evidence? Referring to the TIPS formula, consideration for the *Thing* (suspected contraband) which is the object of the search along with consideration for the sufficiency of the *Information* that tipped off the school official will aid in satisfying the suspicion test.

1. The Thing (in search of)

When a school official is in search of a gun carried to school by a student, the situation is different than if the object of the search is a pack of cigarettes. The potential danger to others should be considered in determining reasonable suspicion. As a general proposition, the higher the degree of danger the less suspicion required.

The search for a dangerous thing can be classified as one of the exceptions the courts have made to the probable cause and warrant requirement. Called the "emergency" exception—it can be characterized as a situation where the object of the search is so inherently dangerous that a search must be conducted immediately to avoid injury.[23] A commentator observed that one court has suggested that all searches in school are emergencies because of the generally poor disciplinary conditions.

At best one court has suggested that "rampant crime and drug abuse" in the schools have reached such a high level that a state of emergency constantly exists, thus lowering the fourth amendment standards.[24] While the Supreme Court traditionally has looked more favorably upon the emergency exception than upon others,[25] school officials should not assume carte blanche because their school is particularly fraught with dangerous discipline problems. Each case must stand on its own and each search and seizure situation must be analyzed with its own particular set of facts.

A companion to the danger element in the emergency exception is the consideration of *time*. In other words, is there a chance that evidence will be lost if the search is postponed? Trosch has noted that this situation has been referred to by the court as the "now or never circumstances."[26]

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22. *Id.* at 745.
23. L. Trosch, R. Williams & F. Devore, *Public School Searches and the Fourth Amendment*, 11 J.L. & Educ. 47 (1982).
24. *Id.*, n.47, *quoting* Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975).
25. *Id.* at 47-48.
26. *Id.* at n.46.

In school, the common object of the search is drugs, which are easily destroyed. Therefore, if the school official believes that the evidence could be destroyed, the search might be conducted without concern for a high degree of suspicion.[27]

The emergency has always been an exception to the probable cause and warrant requirement. Since the *T.L.O.* decision eliminated the need for school officials to have probable cause or a warrant, of what consequence is the emergency exception? It can be viewed as an element which will mitigate against school officials' need to meet the reasonable suspicion test. It would be hard to imagine a situation where the court would not consider the suspicion test having been met if an "emergency" condition existed in a particular school incident.

What to look for: (1) Does the contraband "in search of" represent an immediate physical danger to students, teachers, or searcher? If so, this could be an "emergency exception." (2) Is it possible that if the search is not done immediately the contraband will be destroyed?

2. *The Information*

a. The Informant

In order to meet the reasonable suspicion test, the decision to conduct a search must be based on reliable information, and from whom the information comes can make a difference in meeting this test.

The general standard for assessing the reliability of information was provided by the Supreme Court case of *Illinois v. Gates*.[28] In *Gates*, the Court held that the standard is the "totality of circumstances analysis" where the basis of knowledge of the informant is weighed to decide whether there is probable cause to believe that contraband or evidence is located in a particular place.[29] With such an open-ended test it seems as though tips from any informant would meet the suspicion test. One commentator noted:

> Given such a relaxed test for the sufficiency of probable cause based on an informant's tip, it would seem that almost any reasonable tip will provide adequate suspicion to justify a school search. Indeed, the lower court decisions in this area suggest that this minimal showing will satisfy [f]ourth [a]mendment standards.[30]

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27. *Id.*
28. 462 U.S. 213 (1983).
29. *Id.* at 230.
30. A. Majestic, *Search and Seizure in the Schools: Defining Reasonableness*, 16 Sch. L. Bull. 3 (1985).

However, there are some general gradations of information sufficiency based on the classification of the tipster. Tipsters in the school setting tend to be one of three types: teachers (and other adult school personnel), students, and anonymous phone callers or letter writers.

The *T.L.O.* court as well as lower courts[31] have upheld searches that were based on information provided by school personnel. Tips from this source usually can be considered reliable.

However, tips from students need to be weighed carefully. It is possible that the number of students providing the tip may have an effect. In cases where the courts have assumed the reliability of student tipsters, there has been *more than one* student providing the tip.[32] Courts have specifically evaluated the sufficiency of information from a student tipster[33] and even invalidated the search[34] when only one student provided the tip. To be safe in using a tip from only one student, the student should have a prior history of providing accurate information about illegal activities.[35]

Tips from anonymous sources have been the subject of litigation. State courts have been divided in their consideration of the anonymous tips in the school setting. In an early case, the Illinois Supreme Court upheld the use of an anonymous tip as the basis of a search in school when a gun was the object of the search. The court reasoned that "there is a complete absence of any possible element of gain to the anonymous informant from furnishing false information. . . ."[36] More recently, the New Jersey Supreme Court overturned a student's drug possession conviction because reasonable suspicion was lacking due to the use of an anonymous telephone call as the basis for commencing the search. The call came from a person claiming to be the father of a student with a rumor that another student had been drug dealing the previous school year.[37]

However, a federal district court in Illinois provided the tie breaker. In *Martens v. District No. 220*,[38] the court upheld the use of an anonymous tip in searching a student suspected of drug dealing. The principal received a phone call from a person identifying herself as someone living in the school attendance area. The caller correctly identified the student and the location and type of contraband the

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31. People v. Ward, 233 N.W.2d 180 (Mich. 1975); *In re* Ronald B., 61 P.2d 204 (1978).
32. *In re* W., 105 Cal. Rptr. 775 (1973); Bahr v. Jenkins, 539 F. Supp. 483 (E.D. Ky. 1982).
33. People v. Singletary, 333 N.E.2d 369 (N.Y. 1975).
34. M.J. v. State, 399 So. 2d 966 (Fla. Dist. Ct. App. 1981).
35. State v. J.T., 273 S.E.2d 214 (Ga. 1980).
36. *In re* Boykin, 237 N.E.2d 460, 461 (Ill. 1968).
37. State v. Engerud, 463 A.2d 934 (N.J. 1983).
38. 620 F. Supp 29 (N.D. Ill. 1985).

principal was to search. Later the same day, the principal received another anonymous call from a voice he believed to be that of the earlier caller. This time she identified Martens as a student drug dealer and said where in the lining of a coat the principal could find contraband. This case is one of the first *post-T.L.O.* decisions. The court evaluated the sufficiency of the anonymous information by using the *Gates* standard. It held that the anonymous tip was adequate to satisfy the reasonable suspicion test. The court offered a four-part rationale: First, the high school was facing a substantial drug problem that had resulted in the expulsion of many students before Martens. A tip that a student had drug paraphernalia was thus not inherently implausible. Second, coming from a member of the public rather than the typical police informer from the criminal milieu, the tip was presumptively somewhat more credible. Third, there was substantial evidence indicating the tip was accurate. The principal believed that the Martens tip came from the same caller who had accurately indicated that another student possessed marijuana. There is some other evidence suggesting that the tipster was indeed the same person. Both were female, lived in the same area, had discovered their daughter in possession of marijuana, and refused to disclose their identity or phone number. Finally, the Martens tip was not a blanket allegation but rather outlined Marten's role as a drug distributor, described where he kept his drug paraphernalia and indicated that Martens had the paraphernalia in his possession that day. The detailed nature of the tip weighs in favor of its accuracy.[39]

It is interesting that the court thought a call from the general public was more credible than from a professional tipster. An anonymous tip can satisfy the suspicion test if (1) there is detail in the information, not a blanket allegation; (2) even though anonymous, the call is from a member of the public; and (3) the allegation is plausible under given conditions within the school environment.

b. Sniff Dogs as Informants

It should be noted that the use of sniff dogs in school takes on two dimensions. First, a dog is a source of information and therefore has been subject to evaluation for sufficiency in meeting reasonable suspicion. However, an interesting additional dimension must be considered when a dog actually touches the person being searched. In these instances, a court is likely to view a dog as a search method or measure used which then is evaluated for its degree of intrusiveness against the age and sex of the student. Elaboration on this additional

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39. *Id.* at 32.

dimension will be provided in the section on reasonable scope.

The use of sniff dogs as a sufficient basis for establishing reasonable suspicion has been argued in the courts. In this context, a sniff dog is a source of information; he is a "four-legged" tipster. Sniff dogs have been reviewed as reliable by the courts in establishing reasonable suspicion but only when used for searching inanimate objects. In fact, the courts are not willing to call a sniffing dog a search.[40] The courts reasoned that students do not have a reasonable expectation of privacy in the *airspace* surrounding lockers or cars.

c. Students' Prior History

The reasonable suspicion test can be met when a search involves a student who has a record of contraband activities. For example, in *In re L.L.*[41] the court considered reasonable suspicion to have been met when a student who was known to have carried knives behaved suspiciously. As is the situation with search and seizure issues, much depends on the particulars of each case. Is the student's suspicious activity related to his/her specific history. In the case of *In re L.L.* the student was walking away from a teacher while trying to hide bulges in his shirt pocket. In this case the suspicious behavior was related to the student's prior infractions. The knowledge that certain students have reputations as "bad characters" could not be used as a basis to conduct a search anytime they looked like they were doing something suspicious.

One commentator has suggested that school officials develop a file on students engaged in suspicious conduct. The record would contain information such as: personal appearance of the student, associations with known contraband violators, and variation from the daily schedule.[42]

d. School Officials' Experience

If a school official who is to conduct a search has had some experience in correctly identifying illegal activity, it can help meet the reasonable suspicion test. A case referred to in a previous section, *Nelson v. State*,[43] provides a good example. A school principal conducted a search of students because he "smelled" marijuana in the air which meant that illegal activity was near. Based on his experience, the principal was

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40. *See* Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) *modified* 635 F.2d 524 (7th Cir. 1980); Horton v. Goose Creek, 690 F.2d 470 (5th Cir. 1982), *opinion withdrawn* 677 F.2d 471 (5th Cir. 1982).

41. 280 N.W.2d 343 (Wis. 1979).

42. *See supra* note 23, at 58.

43. 319 So. 2d 154 (Fla. Dist. Ct. App. 1975).

upheld in his search as having had a reasonable suspicion as a basis for undertaking the search.

Some years later, the same principal conducted a search of a student after he observed the student's speech, eyes, and walk. In his experience, the student appeared to be drunk. The court upheld the validity of the search. The principal was found to have had reasonable suspicion.[44]

While a searcher's prior experience in identifying illegal or school rule-breaking activities is helpful in meeting the reasonable suspicion test, caution is needed in assessing the quality of that experience. A school official must act on more than a "hunch." In cases where the principal "feared" the rise of drug problems,[45] or when there were plausible alternative explanations for what appeared to be suspicious student activity,[46] reasonable suspicion was found to be lacking.

e. Individualized Suspicion

As early as the mid-seventies, the courts have recognized individualized suspicion as a prerequisite to a constitutional search.[47] Simply put, a searcher must have reasonable suspicion that the person being searched is the one who is in possession of the contraband.

In the school setting, the student-teacher relationship is often a group relationship. That is, one teacher—one class, with many students in the class. A practitioner should not confuse school officials' authority to hand out "mass punishment" with the individualized suspicion requirement under search and seizure. It has long been recognized that teachers may punish an entire class even though discipline is not justified for each individual student in the class.[48] However, school authorities do not have the same authority to deal with students "in mass" in the conduct of a search. The lower courts since *T.L.O.*, have expressly noted that they would not deal with individualized suspicion issues. However, the courts did suggest that some individualized suspicion might be necessary but it was not an absolute requirement in all cases: "We have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the [f]ourth [a]mendment imposes no irreducible requirement of such suspicion.'"[49]

As will be discussed in succeeding sections, the exceptions to the individualized suspicion requirement come when something other than a student's "person" is being searched, i.e. locker, desk, car.

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44. State v. F.W.E., 360 So. 2d 148 (Fla. Dist. Ct. App. 1978).
45. 481 F. Supp. 26 (D. Or. 1979).
46. 315 N.E.2d 466 (N.Y. 1974).
47. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
48. Restatement (Second) of Torts §154 (1965).
49. 105 S. Ct. at 744 n.8.

In *Bellnier v. Lund*,[50] a search conducted by a principal and a teacher was invalidated when they searched an entire fifth grade class for some stolen money. The court found reasonable suspicion lacking since it could not be shown that the officials had any facts that allowed them to "particularize" which students had possession of the stolen money. While individualized suspicion is not a requirement for school searches only, its place in school was emphasized by the court. The court was concerned about the psychological damage that might occur from a group search. In its rationale, the *Bellnier* court quoted the New York Court of Appeals: "Although the necessities for a public school search may be greater than one for outside the school, the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable."[51]

This line of thinking was extended in a case decided a few days before *T.L.O.* In *Kuehn v. Renton School Dist. No. 403*,[52] the court invalidated a search of luggage of students who were about to go on a band trip. School authorities defended the search with two arguments. First, the school announced in advance that the search would take place prior to departure. Students had warning before bringing their luggage that it would be inspected for alcohol. Second, the band activity as well as the planned trip was voluntary. If the search procedure was objectionable to anyone, that individual did not have to go on the trip. The court rejected the school's arguments saying: "The general search is anathema to [f]ourth [a]mendment and [state constitutional protections], except for the most compelling situations should not be countenanced."[53]

What to look for: (1) Remember to evaluate the tip and tipster that are providing the reason for conducting the search. Does the tip contain details such as the name of the student who is carrying contraband, the type of contraband being held and where it is located? Is the tipster a teacher, student(s), or anonymous? Teachers or other school employees are the best tipsters. Tips from students are acceptable if more than one is providing information. A tip from one student should be from someone who has a reputation for supplying accurate information. Anonymous tips should be evaluated on the sufficiency of detail being provided. Sufficient detail will qualify the source even though anonymous. (2) Reasonable suspicion will be met if the student to be searched has a prior history of suspicious activity that is related to the search. (3) Do not be afraid to rely on one's experience in dealing with search and

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50. 438 F. Supp. 47 (N.D.N.Y. 1977).
51. *Id.* at 54, *quoting* People v. D., 358 N.Y.S.2d 403, 410 (N.Y. 1974).
52. 694 P.2d 1078 (Wash. 1985).
53. *See supra* note 23, at 6 (quoting *Kuehn* at 1082).

seizure. If one has some prior experience, this might help in meeting the reasonable suspicion standard. (4) If one plans to search "the person" of a student, i.e. pockets, purse, or bag that is being carried one should have some notion that that particular student is holding contraband. Mass searches of students will generally not meet the reasonable suspicion test.

D. Reasonable Scope (TIPS)

Prong two of the reasonableness standard is reasonable scope. Once the reasonable suspicion test (prong one) is met, reasonable scope should be considered. Recalling the majority opinion in *T.L.O.*, "a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[54] Referring to the **TIPS** formula consideration for the "**P**lace" (or person) to be searched along with consideration for the nature of the "**S**earch" itself will aid in satisfying the scope test.

*1. The **Place** (or person being searched)*

The place or person being searched has a direct bearing on the scope of the search. The question of scope is a question about the degree of intrusiveness connected with the search. The closer the searcher comes to the body, the higher the intrusiveness and therefore the higher the scope of the search. The highest degree of intrusiveness would be associated with the strip search—the lowest would be the search of an inanimate object such as a locker. Therefore, when searching a student's person a higher degree of procedural regularity is required than when searching a locker or a car. When searching a student's person, the typical situation calls for emptying pockets, purse, or school bag. If a student is actually wearing the clothes, purse or bag at the time, then it is a search of a person. If these things (jackets, purse, or bags) are in the student's locker or car then it is *not* a personal search.

The *T.L.O.* decision was about personal searches. The standard of reasonableness can be directly applied to the conduct of the school officials in the search of students. However, the Court expressly refused to outline standards for locker searches: "We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies."[55]

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54. 105 S. Ct. at 744.
55. *Id.* at 741 n.5.

In a footnote, however, the Court referred to several school search cases where locker searches were upheld due to the lack of a legitimate student expectation for privacy in their lockers.[56] As one commentator has pointed out, a majority of the lower courts have treated locker searches as less intrusive than searches of the person.[57] The more "personal" the search, the more compelling interest must be displayed by the school. An example of a compelling interest of the school might be searching for a bomb or a loaded gun. Less compelling would be searching for tobacco because the school has a rule prohibiting the possession of tobacco. A rule of thumb might be, the more personal the search, the more serious reasons the school should have for conducting the search. In addition, the measure used in the search can be more invasive if not a personal search.

Some early cases help provide examples of the courts' position on locker searches. In the case of *State v. Stein*[58] a high school student argued that he should have been "read his rights" before his locker was searched by the principal. The court rejected the student's argument. In addition, the court maintained that the student had no control of his locker against school officials. It reasoned that:

> A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved.[59]

That same year a related case was decided which further clarified the authority of school officials in searching a locker. In *People v. Overton*,[60] the principal of a high school consented to a search of a student's locker to be conducted with the police. Even though the search was conducted with a defective warrant, the principal, not the student, had the authority to consent to the search. In the eyes of the court, not only did the principal have the authority to search or consent to search but also had a duty to do so: "In summarizing the supervisory position retained by the school, . . . not only have the school authorities a right to inspect

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56. *Id.*
57. *See supra* note 7, at 150 n.101.
58. 459 P.2d 1.
59. *Id.* at 3.
60. 249 N.E.2d 366.

but *this right becomes a duty when suspicion arises* that something of an illegal nature may be secreted there."[61]

However, school authorities should be aware that they might "create" an expectation of privacy with student lockers where generally none would exist. For example, assume that a school has a housekeeping goal in mind for its students. Therefore, the school administration reminds students that they are to take responsibility for their lockers. They should keep them clean and to use a common expression "as if it were your room at home." In this scenario, the school might be increasing or even establishing an expectation of privacy.

In a rare conclusion, the New Jersey Supreme Court held that students have an expectation of privacy in the contents of their lockers. "For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal effects protected by the [f]ourth [a]mendment."[62] Much of the court's rationale was based on the fact that the school had no practice of conducting routine searches of lockers. Schools can help ensure the validity of a locker search by making a general practice of inspecting lockers. Students should be made aware that school authorities intend to inspect lockers routinely. This should be made known at the beginning of the school year with reminders throughout the term.

The search of students' vehicles falls slightly above the search of lockers in its degree of intrusiveness. The standards for personal searches are not required for the search of a vehicle. On the other hand, it is not clear from the case law that the high degree of authority that school officials have for locker searches is available for vehicle searching. A more compelling reason must be present for searching a vehicle than a locker, all other facts being equal. Whether students have access to their cars during the day or not might have a bearing on the degree of interest the school would have in a search. If students do not have access, the school's interest will be minimal and therefore unreasonable.

What to look for: (1) Does one know the reasons why the search of a student is to be conducted? Generally, the more personal the search, the better the reasons must be. The search of a student's pockets or purse must be more compelling than the search of a locker. (2) If one is conducting a general locker search throughout the school, make sure that the student's know in advance that the school makes a practice of routine locker inspection.

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61. *Id.* at 367.
62. State v. Engerud, 463 A.2d 934, 943 (N.J. 1983).

2. *The Search Methods*

In its elaboration of the meaning of reasonable scope, the Supreme Court said that the search should not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[63] When the Supreme Court talks about being "too intrusive" they are referring to strip searches. When they couple the age and sex of the student with their concern for excessive intrusiveness, it comes close to a warning about using strip searches on young children of the opposite sex. As one commentator has observed:

> In crafting the second prong of its reasonableness test, the Supreme Court appears to be sending an implicit warning about the use of "strip searches." As Justice Stevens said in his dissent: "The Court's standard for evaluating the 'scope' of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses."[64]

While protecting against the unnecessary strip search might have been foremost for the Court, the test itself incorporates a concept of gradually permitting more intrusive methods of searching but only as the student becomes older. In addition, if the searcher and the student are not the same sex, more intrusive searches would be limited. Figure 3 is helpful in diagramming the relationship between age, sex, and searching methods.

Note that as the degree of intrusiveness increases so must the age of the student. When the searcher and student are of the opposite sex greater care must be exercised.

a. Specific Methods

As presented in Figure 3, a school official has specific searching methods available that could conceivably be used in personal searches. Asking students to "empty pockets" or purses is the least intrusive search since the student participates and no physical contact is made between the parties. As the degree of body contact increases (or in the case of strip searching—body revealed) so does the need for the searcher to be aware of the student's age and sex. The "pat down" method will often be used by school security personnel in searching for weapons. "Reaching" into pockets, purses or bags to find contraband would increase intrusiveness, but only if the student is wearing the clothes or items at the time. Otherwise a search of this kind would be treated as a search of an inanimate object.

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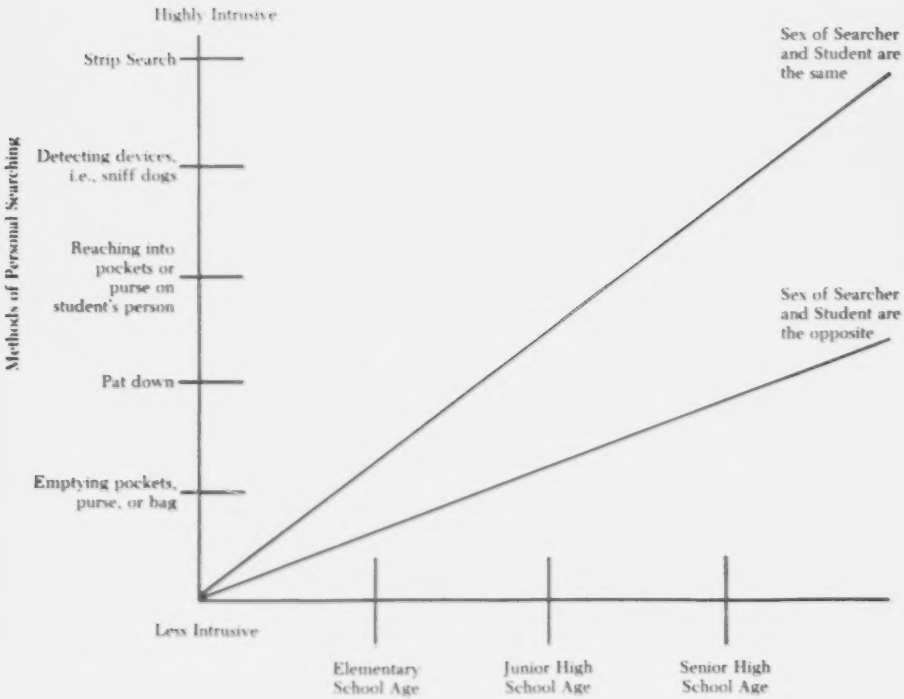
63. 105 S. Ct. at 742.
64. *See supra* note 23, at 7 (quoting in part 105 S. Ct. at 744 n.9).

Figure 3

Compliance Model for Determining Reasonable Scope in Personal Searches by the Searcher


Highly Intrusive
Strip Search
Detecting devices, i.e., sniff dogs
Reaching into pockets or purse on student's person
Pat down
Emptying pockets, purse, or bag
Less Intrusive
Methods of Personal Searching
Sex of Searcher and Student are the same
Sex of Searcher and Student are the opposite
Elementary School Age
Junior High School Age
Senior High School Age

b. Sniff Dogs as a Method

As discussed in an earlier section, the use of a sniff dog may be considered a search method especially if the dog touches the student in the process. The court in *Horton v. Goose Creek Independent School District*[65] noted that sniffing is indeed a method of search that has a relatively high degree of intrusiveness.

> Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.
>
> We need only look at the record in this case to see how a dog's sniffing technique—i.e., sniffing around each child, putting his nose on the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive.[66]

c. Strip Searching

Clearly, the highest degree of intrusiveness is associated with a strip search. The majority of court cases involving strip searching of students have been decided against school authorities. As was discussed earlier, preventing the strip search in schools was foremost in the mind of the *T.L.O.* Court in establishing the reasonable scope test.

The position of the Supreme Court is consistent with earlier cases which invalidated strip searching regardless of how much suspicion school authorities possessed. In *Doe v. Renfrow*,[67] the court held that although a sniff dog had provided reasonable suspicion that a student was carrying drugs, it did not justify a strip search. In *Tarter v. Raybuck*,[68] the body cavity search method invalidated the search. The court said that "privacy interests of youth clearly outweigh *any* (emphasis added) interest in school discipline or order which might be served by such a search."[69] Several courts have gone so far as to suggest that no amount of suspicion would ever justify a strip search.[70] A standard as high as probable cause, and perhaps a warrant, would be

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65. 690 F.2d 470 (5th Cir. 1982).
66. *Id.* at 479.
67. 631 F.2d 91 (7th Cir. 1980).
68. 742 F.2d 977 (6th Cir. 1984).
69. *Id.* at 982-83.
70. M.M. v. Anker, 607 F.2d 588 (2nd Cir. 1979); Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984).

required before a court would validate a strip search.

What to look for: (1) Be aware that the method used for the search is appropriate for the age and sex of the student. The more intrusive the method, the older should be the student. Avoid having members of the opposite sex act as searchers—this greatly decreases chances of meeting the reasonable scope standard. (2) Avoid strip searching, the chances of this method being invalidated are almost certain. (3) When using sniff dogs as a method for personal searches, make sure one has reasonable suspicion well in hand and that one can particularize to individual students. A general "dragnet" search with a sniff dog is only advisable for searching inanimate objects which technically is not a search.

IV. Other Considerations

A. Penalties

As with many of the personal freedoms enjoyed by citizens, constitutional protections are supported by penalties for those who fail to act consistent with the law. In the case of the fourth amendment, the penalty in criminal cases is the application of the *exclusionary rule*. This penalty would prevent the use of evidence found in the illegal search. In most instances, without the evidence, the authorities have no case. Whether the exclusionary rule applies to school searches can be debated. However, it is possible that school officials could be held personally liable for an illegal search. This allows students to seek damages.

1. Exclusionary Rule

A good explanation of the exclusionary rule has been provided by the Supreme Court of Georgia: "The rule is a judicially-created remedy designed to safeguard fourth amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved."[71] The rationale supporting the exclusionary rule is that if authorities know the evidence they work so hard to obtain may be thrown out of court if search and seizure requirements are not followed it will deter unlawful police action. But, does the exclusionary rule apply to the actions of school officials? This is the question New Jersey asked the Supreme Court to decide in *T.L.O.* After hearing oral arguments, the Court decided not to address the issue. One commentator has suggested that there were not enough votes on the Court to abolish the exclusionary

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71. State v. Young, 216 S.E.2d 586, 590 (Ga. 1975).

rule, so the Justices decided to take another issue.[72] As with so many of the unresolved issues in *T.L.O.*, lower court decisions must be used to provide the answers.

In order to determine whether the exclusionary rule applies or not, it must first be determined whether the evidence obtained is used to prosecute criminally in a court of law or whether the evidence is to be used in a school disciplinary procedure. If the evidence is to be used to prosecute criminally, an illegal search is likely to trigger the exclusionary rule. In *Gordon v. Santa Ana Unified School District*,[73] a high school student was subjected to a personal pocket search based on insufficient suspicion. The vice-principal had observed only the student making an unusual number of phone calls throughout the day. The court held that the exclusionary rule does not apply to school disciplinary hearings but does apply when students are to be prosecuted criminally.

> While we concur with the idea that the [f]ourth [a]mendment and the exclusionary rule are not coextensive, we must disagree with a line of demarcation which would treat prosecuted high school students differently from any other defendant. It is no less offensive to the Constitution to permit the introduction of unlawfully obtained evidence in a juvenile or criminal prosecution simply because the site of its improper acquisition happened to have been a high school campus. Arguably, it is more so. We would hold that the exclusionary rule is fully available in criminal prosecutions and juvenile proceedings with respect to evidence illegally obtained by high school officials.[74]

In another case, a Maryland court found that an assistant principal had insufficient suspicion to conduct a pocket search since the student was one of ninety in a gym class who could have been holding contraband. Therefore, the evidence at the criminal trial was contaminated. Maryland had argued that the exclusionary rule did not apply. The court simply and directly rejected the argument saying: "In our view the exclusionary rule developed for [f]ourth [a]mendment violations does apply."[75]

If the searching school official limits the use of obtained evidence to disciplinary proceedings (generally suspension), it is uncertain whether the exclusionary rule will apply to an illegal search. Some cases have held that the exclusionary rule *does* apply to disciplinary procedures. In

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72. *See supra* note 7, at 146 n.82, *citing* Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A.J. 51, 54 (1985).

73. 208 Cal. Rptr. 657 (Cal. Ct. App. 1984).

74. *Id.* at 665.

75. *In re* Dominic W., 428 A.2d 432, 434 (Md. Ct. Spec. App. 1981).

Jones v. Latexo Independent School District[76] a federal district court held that the school could not punish students who were hiding drug paraphernalia in their cars because the evidence was illegally obtained:

> Having obtained evidence against the plaintiffs by means of an unconstitutional search, the defendants could not use that evidence as a justification for imposing punishment. Although criminal proceedings were never instituted against the students, the fourth amendment protects citizens against unreasonable invasions of privacy by government officials in the civil area as well.[77]

Two other cases can be found where the courts held that the exclusionary rule applies to the fruits of an illegal search. However, both of these cases deal with college students.[78] The standards governing search and seizure on the college campus are different than those in the public schools.

A California court held that the exclusionary rule *does not* apply to school disciplinary hearings. The court reasoned that the use of the exclusionary rule would cause harm to the school environment:

> We hold the exclusionary rule inapplicable in high school disciplinary proceedings—even where, as here, they are concededly directed in part toward punishment of the offending student. The social cost in terms of harm to other students, to say nothing of the damage to the morale of parents and teachers, is too dear.[79]

Elimination of the use of the exclusionary rule is consistent with what some observers see as a trend of the Supreme Court toward eliminating the exclusionary rule.[80] On the conservative side, the practitioner who follows the *T.L.O.* reasonableness standard will not have to worry whether the exclusionary rule applies or not.

2. *School Officials' Liability*

The issue of school officials' liability for an illegal search continues to be one of the more important questions in search and seizure law. An early federal district court decision held that although fifth grade

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76. 499 F. Supp. (E.D. Tex. 1980).

77. *Id.* at 237.

78. See Smith v. Lubbers, 398 F. Supp. 777 (E.D. Mich. 1975), Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

79. Gordon J. v. Santa Ana Unified School Dist., 208 Cal. Rptr. 657 (Cal. Ct. App. 1984).

80. *See supra* note 7, at 147 n.82, *citing* Arono, The Rise of Police Logic in the Right to Privacy (G. McClennan ed. 1976), reprinted in Law, Society, and Human Values II-73 (W. Rich, R. Schwartz & J. Skolnick eds. Fall, 1984) (unpublished manuscript).

students were subjected to a strip search, school authorities had qualified good faith immunity. Students did not recover compensatory non-punitive damages since they could not show that the school officials acted with malice.[81]

However, recent cases have held that school officials are indeed liable for damages. In their article published shortly after the *T.L.O.* decision, Zirkel and Gluckman pose several questions and answers regarding issues in search and seizure law. In asking whether school officials may be held liable for illegal school searches, they answer:

> Yes, if the court finds the law to be settled and the jury finds that their belief was consequently not reasonable (footnote omitted). The issue of the applicable constitutional standard may not have been regarded as clearly settled prior to *T.L.O.* (footnote omitted). Now, however, although some related issues remain subject to further settlement, school officials should take care that they can demonstrate reasonable justification for personal searches of students along the lines indicated by the Supreme Court.[82]

At least four courts have held that school officials may be liable for an illegal search. Outlining a few of these will prove helpful. In *Picha v. Wielgos*,[83] a female high school student brought action against three school officials claiming that in the course of their search for drugs they violated her civil rights. The court held that the law was sufficiently settled to deny the school officials' claim of immunity. Because the school officials *should have known* that students have rights under the fourth amendment, this was tantamount to malicious intention.[84]

In *Doe v. Renfrow*,[85] a high school female was strip searched as a result of a sniff dog alert. The court held the school administrators personally liable:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law".[86]

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81. Bellnier v. Lund, 438 F. Supp. 47, 54 (N.D.N.Y. 1977).
82. P. Zirkel & I. Gluckman, *Student Searches Revisited—What Is The Proper Standard?* 69 NASSP Bull. 117, 120 (May 1985).
83. 410 F. Supp. 1214 (N.D. Ill. 1976).
84. *Id.* at 1221.
85. 475 F. Supp. 1012, *modified* 635 F.2d 582 (7th Cir. 1980).
86. 631 F.2d at 92.

More recently, fifth grade students were strip searched because the principal and classroom teacher believed that the students were in possession of drugs. The court found that the school officials could have qualified immunity if they believe they have reasonable cause to search the students. However, since "many courts had generally held that [f]ourth [a]mendment standards,"[87] the school officials should have known that students had constitutional protections at the time of the search. Therefore, the students were entitled to damages and attorney's fees.[88]

To summarize, school officials can be held personally liable if a student can prove that the official acted with malice in denying constitutional rights. Personal liability can also occur when a school official acts with ignorance or disregard for the law. Absent these conditions, a school official has immunity. When strip searching, a official would be hard pressed to find a court willing to support immunity. The case history clearly points to the court's dim view of protecting strip searchers regardless of the facts. Even though a school official may be protected from personal liability under certain circumstances, a student may still be successful in a suit against the school for civil damages.

B. Police Involvement

In order for police to conduct a search in a public school, they must meet a higher standard than school officials. Probable cause and warrant requirements apply to police searches; the reasonableness standard applies for school officials' searches. Because police must meet this higher standard, one commentator has observed that "police will on occasion seek school assistance in searching students. The stronger probable cause standard to which police must adhere makes it more advantageous and opportune for police to merely convince a school principal that a search is needed."[89] Of course, the opposite is often true. Police become involved at the request of school officials. Whether police or school officials initiated the request for involvement, along with other facts, can make a difference in which standard applies. The U.S. Supreme Court refused to address the question in *T.L.O.* stating that:

> We here consider only searches carried out by school

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87. Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984).

88. *Id.* at 1465; *see also*, Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973).

89. K. Alexander and M.D. Alexander, The Law of Schools, Students, and Teachers 141 (1984).

> authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies and we express no opinion on that question (citation omitted).[90]

However, as with other issues in search and seizure law, lower courts do provide some guidance. If the police are involved in the activity, the task of the court is to determine the extent of police involvement. Was the search primarily school official directed or police directed? The answer will provide for the court specific standards to use in evaluating the search.

In addition to the extent of police involvement, whether the purpose of the search was to gain evidence for a school disciplinary proceeding or for a criminal prosecution is determinative. If the police are involved, a court assumes that at least some aspect of the search might involve criminal evidence. The target for police is criminal evidence. The police would not be present if there were not a possibility that they might obtain criminal evidence. The police have no interest in internal school disciplinary matters. Once more it is doubtful that school officials would call the police because they felt incapable of handling their own internal discipline. There is a presumption that school officials call because they suspect criminal activity and wish to give police the opportunity of "making a case."

In the *Picha* decision referred to earlier, the school initiated a call to the police for their assistance with three girls suspected of carrying drugs. However, when the police arrived the strip search was conducted by the school nurse. In this instance the court ruled that the probable cause standard applied even though it appears as though the role of the police was minor. There is some suggestion that the court's position might have been different if the student had not been strip searched. In other words, was it the strip search and not simply the presence of the police that required the higher standard.

Clarification was provided by a case in the aftermath of *T.L.O.* In *Martens v. District No. 220*[91] when a student was asked to empty his pockets by the police, the court said the reasonableness standard, not probable cause applied, the court reasoned first that, the facts were developed by school officials and the call to the police was initiated by them. Second, school officials not the police, made the initial decision to detain and search the student. Third, no criminal investigation was

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90. 105 S. Ct. at 744 n.7.
91. 620 F. Supp. 29 (N.D. Ill. 1985).

contemplated. Fourth, the student would have been searched anyway by school officals had the police not been available.

The extent of police involvement will dictate whether the reasonableness or probable cause standard controls. In evaluating the situation, no one variable regarding police involvement will determine the applicable standard. A confirmation of variables must be considered.

Figure 4

Police Involvement Variables

Presence of four or more may mean the probable cause standard will control	If these variables predominate (four or more), then the reasonableness standard will control
Police & Probable Cause	School Official & Reasonableness
1. Police request to be present	1. School makes the request for police presence
2. Police gather the facts	2. School officials are the factfinders
3. Police make the decision to search	3. School decides that a search is to be conducted
4. Police direct the search activities	4. School directs the what, who and how of the search
5. Police actually do searching	5. School officials performs the search
6. Criminal prosecution is contemplated	6. Only a school disciplinary proceeding is contemplated

At the outset, a decision of school officials to call the police can be crucial. The call for help can be a "wolf in sheep's clothing." Calling the police too soon or letting them take over once they arrive can actually make the situation more difficult for the school. School official's opportunity to discipline the student might be lost if the higher probable cause standard is required because of police involvement.

1. Variations of Police Involvement

School officials might consider taking care of the school disciplinary side of the case *before* calling in police. In other words, gather the facts, make the decision to search based on a reasonable suspicion, conduct the search within reasonable scope, obtain the evidence, decide what school disciplinary procedure is to be used, then call the police. At this point, the evidence can be turned over to the police. If the police decided to prosecute criminally, it is something beyond the disciplinary action. In this way, police involvement will not contaminate the process while the search was being conducted, which would have involved the higher standard of probable cause.

Another alternative is to call in police for "consultation." Police could "stand by" while school officials conduct the search. This approach might give the school a greater sense of security if anything were to go wrong. However, school authorities must be careful in being tempted by the presence of police. Police should not be involved in anyway during the search unless there is an emergency. For example, the school office may be tipped to the presence of a loaded gun or a bomb. When school personnel, students, or property are in immediate danger, school officials should not be concerned with the intricacies of search and seizure standards. Not withstanding this fact, it is likely that the situation would fall under "emergency" exception to the probable cause requirement as discussed in a previous section.

When elaborating on the reasonable suspicion test of the reasonableness standard, the majority in *T.L.O.* ruled that a search by school officials would be justified at its inception when there are reasonable grounds for suspicion that the search will turn up evidence that the student has violated or is *violating either the law* (emphasis added) or the needs of the school."[92] One commentator has suggested that a school official can seek evidence with criminal prosecution in mind but need not be bound by the probable cause requirement, as are police. This provision allows for the "silver platter doctrine" in school search cases where school officials act as surrogates for the police.[93] If allowed, the practice would be viewed as a negative consequence of the *T.L.O.* decision.

2. Security Guards

A number of schools throughout the country employ security guards

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92. 105 S Ct. at 745.

93. J. Stupe & D. Dunaway, *Search and Seizure in the Public School: The Supreme Court Finally Speaks!*, 22 Educ. L. Rptr. 20 (1985).

to assist with school safety and discipline. Are security guards school officials or police? What standard applies for them—probable cause or reasonableness? The leading case, *People v. Bowers*[94] provides some answers. In *Bowers*, a school security guard conducted a pocket search of a student who had a suspicious bulge. The court invalidated the search since it could not be shown that the security guard had probable cause. The court said that the higher standard applied because the guard was a peace officer serving no educational function: "Unlike a faculty member of a school who can search a student on the grounds of reasonable suspicion, a security officer, acting without direction of the school authorities, must premise such a search upon probable cause."[95]

The court reasoned that the security guard's purpose in being at school is different from the school official:

> A member of the faculty views his role in disciplining a student in a different context than that of a security officer. The faculty member will use his experience, education, and unique relationship with the student to discipline him in such a manner as will best benefit the individual and school in general. A security officer, however, is employed for the purpose of maintaining school safety, handling disturbances and acts of crime.[96]

Whether the security guard actually looks like a peace officer or is in plain clothes seems to have no bearing on the matter. The *Bowers* court noted that in a case of a municipal hospital security guard, "he did not wear a uniform nor possess a badge, but was still required to act only on probable cause."[97]

C. Common Errors

1. Consent

Consent is one of the exceptions to the requirements in search and seizure law. If a person to be searched gives consent then that person has fewer rights under the fourth amendment. Can students give consent to be searched?[98] The answer may not be so obvious. One commentator has pointed out that the conditions for consent in a school setting are narrow.

The leading case where student consent was crucial is *Jones v. Latexo*

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94. 356 N.Y.S.2d 432 (1974).
95. *Id.* at 435.
96. *Id.*
97. *Id.*
98. *See supra*, note 23 and accompanying text.

Independent School District.[99] The facts were typical to search and seizure situations in school. A sniff dog was brought in to assist in a search for drugs. The dog identified several student vehicles for possible presence of contraband. Upon a detailed inspection of the cars, drug paraphernalia was found. Six students were suspended. The school authorities argued that they had asked students if they would agree to be searched and therefore fourth amendment restriction did not apply—students had given their consent. The court rejected the argument and reasoned that students in school are afraid not to cooperate with school authorities. Therefore, consent was not freely given.

> The targets of the search were children with limited experience in a threatening situation. Insubordination is a disciplinary offense under school rules. Accustomed to receiving orders and obeying instructions from school officials, they were incapable of exercising unconstrained free will when asked to empty their pockets and open their vehicles to be searched. Moreover, plaintiffs were told repeatedly that if they refused to cooperate with the search, their mother would be called and a warrant procured from the police if necessary. These threats aggravated the coercive atmosphere in which the searches were conducted.[100]

Given the facts in *Jones*, it is difficult to envision when a student could ever be considered to have given consent to a search. School officials would be on precarious grounds if they relied on the consent exception in conducting their searches.

2. *Using the Wrong Standard*

By now the reader will have discovered that there are several standards which might operate in the school setting for search and seizure. The practitioner should know which standard will control in which set of circumstances. Without this knowledge, school officials may fall short of meeting a higher standard or waste time gathering information to a degree of sufficiency that is not necessary. There are three standards which might operate: First, the reasonableness standard, second, the probable cause standard and, third, the modified reasonableness standard.

The reasonableness standard as announced in *T.L.O.* will control in most cases of personal searching in the public school. It is the standard which the Supreme Court felt most appropriate for the school setting.

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99. 499 F. Supp. 223 (E.D. Tex. 1980).
100. *Id.* at 237.

Types of personal searches include: emptying pockets/purses or bags, pat downs, reaching into pockets/purses or bags, sniff dogs, and strip searches. The closer the searcher comes to the body the higher the extent to which reasonable suspicion should be present. It should be theoretically possible to have enough suspicion and factors present to warrant a high intrusive strip search. As a matter of practice, few courts have been willing to accept the strip search.

If searching inanimate objects such as locker, desks or bags, a modified reasonableness standard needs to be met. The *T.L.O.* Court did not announce exactly what the standards are for the search of inanimate objects. However, some form of the reasonableness standard, if followed, would satisfy the Court. The search of an inanimate object is a step away "from the body". The scope of intrusion is far less or even non-existent. Therefore, the degree of reasonable suspicion that must be present before initiating a search is less than for a personal search. A school official must be careful not to confuse an inanimate search for what really is a personal search. If a student is wearing a purse/bag before or during the search of it, this would be considered a personal search. Likewise, if a student is in the car at the time of a vehicle search, this might be more of a personal search than that of an inanimate object (car).

If police or security guards are involved in the search, the standard which operates will be probable cause. The flexibility that is possible with the reasonableness standard will be lost because of the presence of police. A school official must be aware of this before calling the police.

Figure 5

Matching Searches with Standards

Type of search:	Standard to be met:
Personal: i.e. pockets, bags or purse being worn	Reasonableness standard
Inanimate Object: i.e. locker, desk, car or pocket, bag, purse not being worn	A modified reasonableness standard
Police or security guard search	Probable cause and/or warrant

The opportunity for the school to discipline the student may be set aside in deference to the criminal prosecution target of the police. If the police are in charge of a search and later a court finds the search illegal, it is doubtful that the school then could take over and punish the student. In hindsight, it might have been wiser for school authorities to have proceeded without major police involvement, thus making it more probable that the student be punished in some way as opposed to being released. Figure 5 summarizes the relationship among search and seizure standards and the type of search used.

3. *State or Local Standards?*

Meeting the appropriate standard as set by *T.L.O.* or lower courts may not be enough. Practitioners first must check whether their state has search requirements that go beyond federal law. The majority opinion in *T.L.O.* concluded that states could have higher standards for searches under their own constitutions and statutes.[101] Indeed, Louisiana requires that school officials obtain a warrant before conducting a search. The *T.L.O.* decision did not disturb this Louisiana ruling.[102] Several states had required similar "reasonableness standards" prior to *T.L.O.* In California, Delaware, Florida, Illinois, Indiana, Michigan, New Mexico, Ohio, Oregon, Washington and Wisconsin, no significant change occurred because of *T.L.O.*[103] School officials practicing in these states must follow the state requirement first. If the state law is silent in any specific procedural aspect, then the federal requirements would take effect.

Some school districts may have board policy governing search and seizure. These policies can require that school officials use procedures even more protective of students' rights than established in federal or state law. This follows the general proposition that a lower governmental unit can always volunteer to provide greater protection for its citizens than that required of the higher governmental unit. Therefore, school officials should look upon the *T.L.O.* standards as being minimal.

4. *Dragnet Searches*

Earlier, the subject of individualized suspicion was discussed. To an extent, it is necessary for a searcher to know which students specifically

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101. 105 S. Ct. at 745 n.10.

102. *See* State v. Mora, 307 So. 2d 317 (La. 1975), *vacated* 423 U.S. 809 (1976).

103. D. Franklin, *Search and Seizure in Public Schools—The Supreme Court's Impact on School Security*, 58 Am. Sch. & U. 4-5 (Sept. 1985).

are carrying contraband. Searching an entire group of students is not permitted. Searching an entire section of lockers or a row of unoccupied cars can be permitted. A school official must remember when a dragnet can be conducted—with inanimate objects only.

V. Post *T.L.O.* and Drug Testing

Many cases since *T.L.O.* have been decided in the state courts. In those instances, the courts have followed the *T.L.O.* reasonableness standard and objectively applied it to the facts presented.[104] Similarly, two federal district court decisions have applied the *T.L.O.* standard. *Martens v. District No. 220*,[105] (discussed earlier in this monograph) and *Cales v. Howell Public Schools*[106] are good examples of how the courts have been applying the reasonableness standard. While some heralded *T.L.O.* as a big victory for school authorities, practitioners should not assume that the correct application of the reasonableness standard will always produce success for school authorities. As one commentator observed about the post-*T.L.O.* cases: "It does not appear that the courts when applying the reasonable suspicion standard, have favored the schools' legitimate need to maintain order and safety over students' legitimate expectations of privacy . . . . [T]he courts have upheld the searches in some instances and found them unreasonable in others."[107]

The *Cales* case provides an interesting caveat in applying the reasonableness standard. Ruth Cales was a 15 year-old high school sophomore in Howell, Michigan. During classtime, the student was observed by a security guard hiding behind a car in the school parking lot. She gave a false name when confronted by the guard. She was guided to the assistant principal's office where she was ordered to empty her purse. The purse contained "readmittance slips" which students were not allowed to have in their possession. The assistant principal then requested another assistant principal (a woman) and a secretary (also a woman) to conduct an additional search for drugs. While in the presence of the two female searchers, Cales was instructed to turn her pant pockets inside out. She then removed her pants completely although not

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104. *See* State of West Virginia v. Joseph T., 336 S.E.2d 728 (W. Va. 1985); *In re* Robert B., 218 Cal. Rptr. 337 (Cal. Ct. App. 1985); *In re* William G., 221 Cal. Rptr. 118 (Cal. 1985); State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986).

105. 620 F. Supp. 29 (N.D. Ill. 1985).

106. 635 F. Supp. 454 (E.D. Mich. 1985).

107. E. Mondschein & M. Martin, *Search and Seizure in the Public Schools: The Aftermath of T.L.O.*, NOLPE School Law Update 1987 (T. Jones & D. Semler, eds. 1987).

requested to do so. Cales was ordered to bend over so her bra could be looked into. At no time during any of the searching was the student's body touched. Cales sued the school district alleging that the school administration had no reasonable suspicion to search her for drugs. In deciding for the student, the court held that the school's suspicion was not reasonably related to the object of the search. Cales' observed behavior could have indicated that she was violating any number of school rules other than a drug violation. In the court's words:

> It is clear that plaintiff's conduct created reasonable grounds for suspecting that some school rule or law had been violated. However, it does not create a reasonable suspicion that a search would turn up evidence of drug usage. Plaintiff's conduct was clearly ambiguous. It could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend. In short, it could have signified that plaintiff had violated any of an infinite number of laws or school rules. This court does not read *T.L.O.* so broadly as to allow a school administrator the right to search a student because that student acts in such a way as to create a reasonable suspicion that the student has violated rule or law.[108]

Thus, the practitioner should be able to relate observed behavior of a student specifically to the object of the search. In order for the school to have prevailed in the *Cales* case, they would have had to have seen the student using or holding drugs before conducting the search.

In a related case, the issue of *drug testing* is combined with search and seizure. Cracking down on drug use in schools has been a major theme supported by authorities as prominent as the President of the United States. However, in an effort to eradicate an evil, school authorities may be infringing on students' fourth amendment rights since a drug test is a search and therefore the reasonableness standard must apply.

In *Odenheim v. Calstadt-East Rutherford Regional School District*,[109] a New Jersey school board adopted a policy called "Comprehensive Medical Examination." Each student was to be examined to determine whether students suffered from "any physical defects, illnesses, or communicable diseases." Part of the examination included a urine sample which was analyzed for drugs including alcohol. Students sued the school district arguing that the urine testing was a general search of their bodies for which school authorities had no particularized suspicion. Deciding for the students, the court reasoned: "Assuming arguendo, that

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108. 635 F. Supp. at 455.
109. 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

this is strictly and solely a medical examination to inquire into a medical condition, a position which this court does not accept. I would still find that the activities [of the school officials] violate the reasonable privacy expectations of school children."[110]

It remains to be seen whether the *Odenheim* requirements for reasonable suspicion in student drug testing will stand up under appeal. However, cases since *Odenheim* where the issue involved drug testing of teachers seemed to follow its line of thinking.[111]

VI. Summary

At the onset of this monograph, several important questions were posed regarding search and seizure law. The following will provide a brief answer to those questions.

Question 1: Does the *exclusionary rule* apply to the fruits of an unlawful search in the public school?

Answer: Yes and no. If the evidence is going to be used to prosecute criminally, the exclusionary rule applies. If the evidence is to be used for punishing the student under school rules, the exclusionary rule does not apply.

Question 2: Do students have privacy rights in connection with their lockers, desks or other storage areas?

Answer: Yes. Students have some privacy rights but those rights are very limited. School authorities should have some reasonable suspicion before searching an individual student's locker. A general "dragnet" style locker a search could be conducted without individualized suspicion if the school makes a practice of conducting routine locker searches and makes it known to students that the school intends to utilizes such a practice.

Question 3: Is it necessary to have individualized suspicion before searching?

Answer: Yes and no. If the search is "personal" (i.e. pockets, purses or back packs) individualized suspicion is required. If the search focuses on a storage area and is part of a routine check of many storage areas, individualized suspicion is not required.

Overall the practitioner must keep a number of variables in mind when applying the reasonableness standard to a search and seizure

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110. *Id.* at 713.

111. *See* Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); Patchogue - Medford Congress of Teachers v. Board of Educ. of Patchogue - Medford Union Free School Dist., 505 N.Y.S.2d 888 (N.Y. App. Div. 1986).

situation. The **TIPS** formula will help keep the variables clear. First, there must be reasonable suspicion that the search will turn up evidence. To meet the suspicion test the searcher should remember **TI** of the **TIPS** formula. "**T**" stands for *thing*. What thing (kind of contraband) are you searching for? The more dangerous the thing for which you are searching the less suspicion is required. Next, the searcher should remember is "**I**". "**I**" stands for *information*. What information does the searcher have that the contraband actually exists? Who gave that information to the searcher? Does it come from a reliable source? If the searcher has a good information base, it will help in meeting the suspicion test.

After the suspicion test is met, the searcher must meet the scope test. To meet reasonable scope, the searcher should remember **PS** of the **TIPS** formula. "**P**" stands for *place or person*. Whether the searcher is searching a person or an object (place) will dictate the extent to which the expectation of privacy can be intruded upon. The more personal the search, the more serious reasons the school should have for conducting the search. A highly intrusive search should not be conducted on a students person if there is only a minor violation at stake. "**S**" stands for *search methods*. A searcher can conduct a search by asking the student to empty a pocket all the way to taking off their clothes. The methods use in the personal search should be no more invocative than need be in order to get the evidence. The searcher must keep in mind the age and sex of the student when deciding on a search method. The younger the student, the less flexibility the searcher has in using a highly invocative method such as a sniffing dog. Also, when possible the sex of the searcher should be the same as the student.

VII. Conclusions and Recommendations

Justice White, in writing for the majority in *T.L.O.* commented on the effect of the reasonableness standard: "the standard we trust . . . will save teachers and administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct *according to the dictates of reason and common sense* (emphasis added)."[112] The court expressed the opinion that school officials should use their judgment as educators in dealing with search and seizure. However, as in most issues facing a modern society, some familiarity with law is necessary. The information in this monograph can

112. 105 S. Ct. at 744.

serve to orient a school practitioner in search and seizure law, it should be carefully read. At the same time, the monograph is not an instruction booklet that can be followed in a technical sense. The monograph must be teamed with "reason and common sense." By doing this, school authorities will have the best chance of avoiding the pitfalls in providing students with their constitutional rights.